

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

JAMES DENNY,	:	
Plaintiff,	:	No. CV 22-00,260
	:	
vs.	:	
	:	CIVIL ACTION
CITY OF WILLIAMSPORT and	:	
GLENN O. HAWBAKER, INC.,	:	
Defendants.	:	JURY TRIAL DEMANDED

OPINION AND ORDER

AND NOW, this 30th day of May 2024, upon consideration of the Defendant's Motion for Sanctions (the "Motion"),¹ Plaintiff's response to the Motion (the "Response"),² and the arguments of the parties,³ it is hereby ORDERED and DIRECTED that the Motion is DENIED for the reasons explained at length below.

I. BACKGROUND.

Plaintiff James Denny commenced this action against Defendants City of Williamsport (the "City") and Glenn O. Hawbaker, Inc. ("Hawbaker") by Complaint filed on March 10, 2022.⁴ Plaintiff is a resident of the City, and Hawbaker is a corporate entity in the business of heavy and highway construction. This case arises out of personal injuries Plaintiff allegedly sustained as a result of a supposedly dangerous condition created by Hawbaker in connection with paving work at or near the intersection of Campbell Street and Vallamont Drive in the City.

¹ "Defendant Glenn O. Hawbaker, Inc.'s Motion for Sanctions," filed November 14, 2023.

² "Plaintiff's Answer in Opposition to Defendant's Motion for Sanctions," filed December 12, 2023. Plaintiff also filed "Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Sanctions" with his answer on December 12, 2023 ("Plaintiff's Brief").

³ The Court heard argument on the Motion on January 17, 2024. Scheduling Order, dated and entered December 4, 2023. Jeffrey McGuire, Esq. was present and made argument for the Defendant, and Sarah Nayeem was present and made argument for the Plaintiff.

⁴ Plaintiff's "Civil Action Complaint," filed March 10, 2022.

More specifically, Plaintiff contends that on July 24, 2021 he was lawfully operating an electric scooter on a City street when, as a direct result of a defective and dangerous condition upon the street—*i.e.*, a pothole resulting from Hawbaker’s ongoing construction activities for the City (the “Project”), Plaintiff sustained a variety of physical injuries and other losses (the “Incident”). Plaintiff contends that the Defendants had a duty to prevent or mitigate the harms he suffered and that they negligently breached that duty.⁵

The parties engaged in pretrial litigation, and the case was tried to a jury on October 25, 2023. After trial commenced but prior to the close of testimony, Plaintiff’s counsel began to ask a representative of Hawbaker about Hawbaker’s convictions for several felonies for theft for failure to make required disposition of funds in 2021. Counsel for Hawbaker objected and moved for a mistrial, contending that evidence of corporate malfeasance did not impeach the testimony of the individual witness and that the information was so inflammatory and prejudicial as to preclude the possibility of a fair trial. Plaintiff asserted that Defendant’s convictions constitute *crimen falsi* admissible to impeach Hawbaker under Rule 609, Pennsylvania Rules of Evidence.⁶

The Court granted the Defendant’s motion and declared a mistrial,⁷ citing *Walden v. Georgia-Pacific Corp.*⁸ for the proposition that corporate “[c]riminal acts are relevant to a witness’ credibility only if that witness actually participated in the

⁵ *Id.*

⁶ Pa. R. Evid. 609(a) (“For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, must be admitted if it involved dishonesty or false statement”).

⁷ Order, dated October 25, 2023 and entered October 26, 2023.

⁸ *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3d Cir. 1997).

criminal conduct.”⁹ Typically, “[a] mistrial is only appropriate where the occurrence is so inflammatory and prejudicial so as to preclude a fair trial and to have undoubtedly influenced the jury, distracting the minds of the jurors from the pivotal issue and influencing their verdict.”¹⁰ Nevertheless, the Court found that

the convictions are not relevant, in that they do not make it more or less likely that Defendant’s acts or omissions caused Plaintiff’s injuries, if any. Indeed, Defendant did not proffer evidence of its good reputation, such that the convictions might constitute corporate impeachment. Moreover, information concerning the convictions is highly prejudicial. Because the jury heard information that is not relevant and that is highly prejudicial, the Court concludes that a curative instruction would have been insufficient to ensure Defendant’s right to a fair trial.¹¹

Subsequently, Defendant Hawbaker filed the instant Motion on November 14, 2023. Defendant contends that the mistrial resulted from Plaintiff’s counsel’s inappropriate question of a witness and that “Plaintiff’s counsel chose to recklessly go forward with the distinct possibility of a mistrial with inadmissible evidence in an effort to simply ambush the witness.”¹² Instead, Defendant takes the position that Plaintiff should have filed a motion *in limine* prior to trial or requested a sidebar at trial prior to initiating her line of questioning to seek a ruling concerning admissibility.¹³ Defendant contends that Plaintiff’s counsel’s conduct was “more than simple advocacy” and was “in bad faith and ... intentionally vexatious and/or

⁹ *Id.*, 126 F.3d at 523-24 (“Criminal acts are relevant to a witness’ credibility only if that witness actually participated in the criminal conduct. It strains logic to argue that an employee’s credibility is properly brought into question by the mere fact that he or she is presently employed by a corporation that in some unrelated manner was guilty of dishonest acts, no matter how egregious those acts may have been. There is no evidence that the individual witnesses who testified at trial had any involvement with Georgia–Pacific’s tax evasion scheme, and thus that scheme could not possibly bear on the likelihood that those witnesses would testify truthfully.” (footnotes omitted)).

¹⁰ *Harsh v. Petroll*, 840 A.2d 404, 432 (Pa. Commw. 2003) (citing *Com. v. Brown*, 676 A.2d 1178 (Pa. 1996), cert. denied, 519 U.S. 1043 (1996)).

¹¹ Order, dated October 25, 2023 and entered October 26, 2023, at 2 n.1.

¹² Motion, ¶¶ 3-6, 9.

¹³ *Id.*, ¶¶ 7-8.

dilatory under 42 Pa. C.S. §2503(7).”¹⁴ Defendant seeks “to recoup their trial costs and the costs of this Motion for the inappropriate actions of Plaintiff’s counsel.”¹⁵

In opposition, Plaintiff’s counsel contends that her conduct was neither reckless, dilatory, nor vexatious. She argues that Defendant is improperly shifting the burden on to Plaintiff to determine the admissibility of the evidence in question, when Defendant could have filed a motion *in limine* to preclude use of that evidence at trial.¹⁶ She submits that “evidence related to the credibility of a witness is always relevant[.]”¹⁷ As such, she asserts that she was “well within her rights to attempt to impeach the corporate Defendant through its representative as the corporate entity itself could never testify as a witness.”¹⁸ Further, she contends that even if a mistrial was warranted, sanctions are not, because Defendant did not meet its burden of establishing that her conduct was “in bad faith or intentionally vexatious and/or dilatory.” She points out that our Superior Court has held that “[p]arties have been found to have acted ‘vexatiously’ when they have pursued their claim in the face of settled law or in contravention of clear court rulings that their claim was without merit,”¹⁹ which is not the case here.²⁰

II. LAW AND ANALYSIS.

“The general rule within this Commonwealth is that each side is responsible for the payment of its own costs and counsel fees absent bad faith or vexatious

¹⁴ *Id.*, ¶¶ 10-11.

¹⁵ *Id.*, ¶ 19. Defendant details the expenses it incurred in the Motion and concludes by offering to present redacted invoices in support of its claims and by reserving the right to request further reimbursement as circumstances dictate. *Id.*, ¶¶ 13-21.

¹⁶ Plaintiff’s Brief, at 2-3.

¹⁷ *Com. v. Brown*, 212 A.3d 1076, 1087 (Pa. Super. 2019).

¹⁸ Plaintiff’s Brief, at 3.

¹⁹ *Berg v. Georgetown Builders, Inc.*, 822 A.2d 810, 821 (Pa. Super. 2003).

²⁰ Plaintiff’s Brief, at 4. The Court found that a mistrial was appropriate on the basis of the Third Circuit’s holding in *Walden*, *supra*. As that case was decided by a federal circuit court, it is not binding law in Pennsylvania state courts. Neither the Court nor either of the parties identified a controlling case on the issue decided in *Walden*.

conduct.”²¹ Thus, counsel fees may be awarded only where there is express statutory authorization,²² and the party seeking such an award has the burden of proving existence of one of the statutory conditions authorizing it.²³

Defendant asserts entitlement to counsel fees and other costs incurred pursuant to 42 Pa. C.S. Section 2503(7), as a result of Plaintiff’s counsel’s question to a witness that ultimately resulted in a mistrial. Defendant characterizes counsel’s conduct as “intentionally vexatious and/or dilatory.”²⁴ Section 2503(7) permits an award of counsel fees as part of the taxable costs of a case “as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter.”²⁵ Our Supreme Court recently defined those terms as follows:

Vexatious conduct is without reasonable or probable cause or excuse; harassing; annoying. **[O]bdurate** conduct may be defined in this context as stubbornly persistent in wrongdoing. Conduct is **dilatory** where the record demonstrates that counsel displayed a lack of diligence that delayed proceedings unnecessarily and caused additional legal work.²⁶

Whether counsel fees should be awarded in any particular case depends on the facts of that case,²⁷ and counsel fees may not be awarded absent sufficient evidence to support a finding of the necessary statutory conditions.²⁸ An award of

²¹ *Riverview Carpet & Flooring, Inc. v. Presbyterian SeniorCare*, 299 A.3d 937, 983 (Pa. Super. 2023) (quoting *McMullen v. Kutz*, 603 Pa. 602, 985 A.2d 769, 775 (2009) (citation omitted)).

²² *Id.*

²³ *Berg, supra*, 822 A.2d at 816.

²⁴ Motion, ¶ 11.

²⁵ 42 Pa. C.S. § 2503(7). An award of counsel fees under Section 2503 is not the same as an award of counsel fees based upon a finding of civil contempt. *Carlino E. Brandywine, L.P. v. Brandywine Vill. Ass’n*, 197 A.3d 1189, 1204 (Pa. Super. 2018).

²⁶ *County of Fulton v. Sec’y of Com.*, 292 A.3d 974, 1014 (Pa. 2023) (citations and quotation marks omitted; emphasis in original).

²⁷ *Id.*

²⁸ See, e.g., *Stevens v. Com., Dep’t of Transp., Bureau of Driver Licensing*, 309 A.3d 193, 205-08 (Pa. Commw. 2024) (reversing trial court’s award of attorney’s fees against PennDOT where “the record before [the Commonwealth Court] does not include substantial evidence supporting the trial court’s finding that PennDOT engaged in dilatory, obdurate, or vexatious conduct that would justify an award of counsel fees under Subsection 2503(7)”).

counsel fees under Section 2503(7) must be supported "by a trial court's specific finding of dilatory, obdurate or vexatious conduct."²⁹

Here, the witness James Brent, who is an employee of Defendant Hawbaker, took the stand to testify about the roadway at issue. At the time of the Incident, Mr. Brent was the project manager on the Project.³⁰ Plaintiff's counsel asked Mr. Brent, "Okay. And in fact, in 2021, Glenn O. Hawbaker, Inc. was convicted of four counts of theft by failure to make—."³¹ Defendant immediately objected and requested a sidebar.³² At sidebar, Defendant argued that the question was not relevant to the veracity of the witness; that it introduced evidence that was not relevant to the case at hand; and that unfair prejudice outweighed the probative value of the evidence. Plaintiff contended she had the right to introduce *crimen falsi* evidence to impeach the witness.³³ As explained above, the Court, citing *Walden, supra*, concluded that evidence of a corporate conviction could not be used to impeach an individual witness who had nothing to do with the matters from which the corporate conviction arose.³⁴ The Court agreed with Defendant that no curative or cautionary instruction to the jury could mitigate the prejudice and declared a mistrial.

While the Court concluded that a mistrial was appropriate and that a curative instruction would be insufficient, the Court did not make a finding of bad faith or of dilatory, obdurate or vexatious conduct on the part of Plaintiff's counsel. Counsel fees may be awarded as a sanction for a mistrial caused by counsel's misconduct;

²⁹ *Twp. of South Strabane v. Piecknick*, 686 A.2d 1297, 1301 (Pa. 1996).

³⁰ Transcript of James Brent's testimony at trial, attached as Exh. A to the Motion, at 2.

³¹ *Id.*, at 12.

³² *Id.*

³³ See Pa. R. Evid. 609(a) ("For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, must be admitted if it involved dishonesty or false statement").

³⁴ See, *supra*, Part I.

however, such a sanction is typically imposed after counsel has violated a court order³⁵ or where there has been persistent misconduct.³⁶ Such is not the case here.

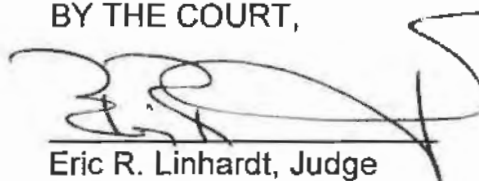
Counsel's question may have been impertinent and ill-advised, but, in the absence of controlling legal authority³⁷ and of evidence of bad faith and of dilatory, obdurate or vexatious conduct, the Court is not in a position to award counsel fees as a sanction against Plaintiff or Plaintiff's counsel. Furthermore, the Court does not believe, and, therefore, cannot find, that counsel intentionally sought to cause a mistrial.

III. CONCLUSION AND ORDER.

For the reasons explained above, Defendant's Motion for Sanctions filed on November 14, 2023 is DENIED.

IT IS SO ORDERED.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/bel

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³⁵ See, e.g., *Davis vs. SEPTA*, 680 A.2d 1223 (Pa. Commw. 1996) (holding that a trial court may impose an award of counsel fees as a sanction where, despite the trial court's having granted plaintiff's motion *in limine* precluding defendant from mentioning or introducing evidence of plaintiff's prior convictions, defense counsel elicited testimony of them from plaintiff, after which the trial court granted a mistrial and imposed costs and sanctions against defense counsel and the defendant), alloc. den., 687 A.2d 381 (Pa. 1997).

³⁶ See, e.g., *Esquivel v. Johnson & Johnson*, 2013 WL 7122304 (CP Phila. Cnty. 2013) ("Where intentional and repetitive continuous conduct has resulted in significant and unnecessary cost to an opposing party, a court has inherent authority to impose fees and costs both to reimburse defendant for unnecessary expenses which must be incurred a second time at retrial, to dissuade counsel from similar behavior at retrial and inherently to protect the courtroom as a pursuit of truth").

³⁷ See, *supra*, n. 20.